

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOURNE CO.,

Plaintiff,

-against-

TWENTIETH CENTURY FOX FILM CORPORATION,
FOX BROADCASTING COMPANY, TWENTIETH
CENTURY FOX TELEVISION, INC., TWENTIETH
CENTURY FOX HOME ENTERTAINMENT, INC.,
FUZZY DOOR PRODUCTIONS, INC., THE
CARTOON NETWORK, INC., SETH MACFARLANE,
and WALTER MURPHY,

Defendants.

Case No. 07 Civ. 8580 (DAB)

Deposition of JEREMIAH HORAN, pursuant
to Rule 30(b)(6) Notice, held at the offices
of Loeb & Loeb, 345 Park Avenue, New York, New
York, on Friday, February 29, 2008, commencing
at 9:57 a.m., before James W. Johnson,
Registered Professional Reporter and a Notary
Public of the State of New York.

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1 Horan
2 knowledge.
3 MR. ZAVIN: And just again for
4 clarification of the record, that letter is
5 Bates stamped Bourne 0001 through 0002.
6 Q. Mr. Horan, can you explain to me why,
7 having discovered this in March of 2007, Bourne
8 made no claim or didn't bring this to the attention
9 of Fox until June 21st, 2007.
10 A. As I said, we were researching to make
11 sure that we in fact had not issued any licenses or
12 had not received any kind of requests for licenses,
13 and discussed possible actions to take directly,
14 and we decided at that point that we would consult
15 Mr. Levy.
16 Q. Prior to March 2007 had anyone
17 communicated any complaint to Bourne with respect
18 to this use of "When You Wish Upon A Star?"
19 A. No.
20 Q. Had any licensee or potential licensee
21 of "When You Wish Upon A Star" communicated any
22 complaint or brought this use to the attention of
23 Bourne?
24 A. No.
25 Q. Had any licensee prior to March 2007

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1 Horan
2 said they weren't going to license "When You Wish
3 Upon A Star" because of the use in "Family Guy?"
4 A. No.
5 Q. Has Bourne ever granted a license to
6 parody "When You Wish Upon A Star?"
7 A. No.
8 Q. Is that -- has anyone ever asked for a
9 license to parody "When You Wish Upon A Star?"
10 A. Not to my knowledge.
11 Q. But it's fair to say you don't know
12 whether the request that Fox made was to parody
13 "When You Wish Upon A Star?"
14 A. I'm sorry, but I don't, I don't know
15 that, I never saw the original request from Fox, so
16 I don't know what it says.
17 Q. Right, and Bourne doesn't know what it
18 says?
19 A. Right, so we can't say that, I can't say
20 that, if, that Fox was the first one. I cannot say
21 that.
22 Q. But you just don't know either way?
23 A. Either way, correct.
24 Q. Why was the decision made to make a
25 claim against Fox with respect to this, the use by

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1 Horan
2 Fox in "Family Guy?"
3 A. The decision was made because as a music
4 publisher we have a right and an obligation to
5 protect our copyrights, and we felt that this use
6 was an invalid use, was an unlicensed use, and
7 therefore we had a right and an obligation to make
8 a claim.
9 Q. Was that the sole reason?
10 A. Yes.
11 (Horan Exhibit 3, Complaint and Jury
12 Demand, marked for identification.)
13 Q. From 1999 to the present, when you were
14 doing your second stint at Bourne --
15 A. Yes?
16 Q. -- do you know how many copyright suits
17 Bourne commenced to protect its copyrights?
18 MR. FAKLER: Object on the ground it's
19 outside the scope of the 30(b)(6) notice.
20 MR. ZAVIN: Objection is noted.
21 A. I know specifically of two that did not
22 go to trial, that complaints were made for invalid
23 use of Bourne copyright songs.
24 Q. Do you know what songs were involved?
25 A. Yes.

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1 Horan
2 Q. Which songs were they?
3 A. One was "Whistle While You Work," and
4 one was "Hi Ho." The other was "Hi Ho."
5 Q. Who were these claims made against?
6 A. "Whistle While You Work" was made
7 against the Ying Yang Twins and their record
8 company, the name of which I cannot remember, and
9 the other was, the other suit was against Alfred
10 Publishing.
11 Q. Were uses made of either of these songs
12 claimed to be parodies?
13 A. No.
14 Q. Do you know what market substitution is?
15 A. Yes.
16 Q. In your view, what is market
17 substitution?
18 A. In the case of in the music industry,
19 the use of one song for another song or a similar
20 song, substituting one song for another, for
21 whatever use is being made.
22 Q. So that is it fair to say a potential
23 licensee, you know, wants song A, but instead of
24 using song A it uses song B?
25 A. That's correct.

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Horan

1
2 Q. Does Bourne have evidence of "I Needed
3 You" substituting in the market for "When You Wish
4 Upon A Star?"

5 A. Well, we have the immediate evidence
6 that we don't have a synchronization license or fee
7 for the use on "Family Guy." Nor do we have
8 performance income from that use, but then also, as
9 stated in Ms. Siroka's report, we don't always,
10 people don't tell us why they don't use a song, but
11 these things do affect a potential user's decision
12 to use the song.

13 Q. Let me clarify the question.

14 Does Bourne have any evidence that any
15 potential licensor, putting Fox aside for the
16 moment, that "Family Guy" any other potential user
17 or licensor or purchaser of songs has chosen to
18 purchase "I Needed You" instead of purchasing or
19 licensing "When You Wish Upon A Star?"

20 A. No, we do not.

21 (Horan Exhibit 4, Responses to
22 Defendant's First Request for Admissions,
23 marked for identification.)

24 Q. I'm showing you a document that's been
25 marked as Exhibit 4, which I will represent to you

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Horan

1 A. In my opinion, no.

2 Q. So could you explain to me the basis for
3 the denial of request for admission number 11,
4 which states, "Admit that," quote, "I Needed
5 You," end quote, "cannot serve as a substitute in
6 the market for the song."

7 A. Again, I, I don't know that -- we don't,
8 Bourne Company doesn't know that somebody, what
9 somebody could do, so therefore we deny it. We
10 can't say specifically that it cannot serve as a
11 substitute in the marketplace for the song.

12 Q. But it's your opinion that it cannot? I
13 think you just testified to that.

14 MR. FAKLER: Objection, asking for a lay
15 opinion.

16 A. Again, my personal opinion is that it
17 cannot.

18 Q. And then let's go to request for
19 admission number 12, which says, "Admit that
20 plaintiff," or Bourne, "is not aware of any
21 instances where a consumer or other potential user
22 or licensee of this song has purchased, used or
23 licensed 'I Needed You' instead of the song."

24 What is the basis of the denial of that

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Horan

1 is the responses to requests for admissions that we
2 received from Bourne, and the first question is, do
3 you recognize it?

4 A. Yes.

5 Q. You've seen it before?

6 A. Yes, I have.

7 Q. Did you participate in its preparation?

8 A. Yes, I did.

9 Q. Okay, could you tell me the basis of the
10 denial for request for admission number 10 on
11 page 5, and just so the record is clear, the
12 request for admission reads, "Admit that," quote,
13 "'I Needed You,'" end quote, "has not served as a
14 substitute in the market for the song," the song
15 being "When You Wish Upon A Star," and what is the
16 basis for the denial of that request for admission?

17 A. Because we were not aware of any use
18 does not necessarily mean to us that it has not
19 been used.

20 Q. In your opinion, would any licensor who
21 wants to use "When You Wish Upon A Star" think that
22 "I Needed You" is an acceptable substitute?

23 MR. FAKLER: Objection to the request
24 for an opinion, a lay opinion.

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Horan

1 request for admission?

2 A. Again, we are not aware of any, but we
3 don't know, so we can't admit that, we cannot say
4 that there is an instance or not.

5 Q. Mr. Horan, I suggest that you read that
6 request for admission carefully, because I believe
7 that it asks, admit that you are not aware of any
8 instances of substitution, and yet you denied that,
9 which is denying -- it implies to me that you are
10 aware of instances of market substitution.

11 Can you explain to me what the basis of
12 the denial for that request for admission was.

13 A. No, I cannot in that case.

14 Q. Do you agree with me that Bourne does,
15 is not aware of any instance where a consumer or
16 other potential user or licensee of the song has
17 purchased, used or licensed "I Needed You" instead
18 of the song?

19 MR. FAKLER: Objection, misstates his
20 prior testimony.

21 MR. ZAVIN: I, I was asking him whether
22 he agreed with that statement.

23 Q. You can answer the question.

24 A. Would you repeat the question.

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1 Horan
 2 Q. That Bourne is not aware of any
 3 instances where a consumer or any other potential
 4 user or licensee for the song has purchased, used
 5 or licensed "I Needed You" instead of the song.
 6 A. Correct, we are not aware.
 7 Q. Now, other than Ms. Siroka's opinion --
 8 put that aside for the moment -- does Bourne have
 9 any evidence that the song "I Needed You" as it
 10 appears in "Family Guy" has harmed the market for
 11 "When You Wish Upon A Star?"
 12 A. As I said, the, the fact that it was
 13 used without a license in "Family Guy" is, is -- no
 14 synch license, no performance license, has harmed
 15 our market.
 16 Q. Putting aside any royalty you were
 17 deprived of by Fox, Fox's use, putting aside
 18 Ms. Siroka's report, do you have any evidence
 19 whatsoever that the song "I Needed You" as it
 20 appears in "Family Guy" has harmed the market for
 21 "When You Wish Upon A Star?"
 22 A. No.
 23 Q. When did you first contact -- and when I
 24 say "you" I mean Bourne -- first contact
 25 Ms. Siroka?

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1 Horan
 2 A. We contacted -- we didn't have direct
 3 contact with her. She was contacted by our
 4 attorneys.
 5 Q. Do you know when?
 6 A. I don't know the exact date. It was
 7 within the last month.
 8 Q. Okay, that is actually what I wanted to
 9 know, so I'm going to show you a document that's
 10 been marked as Exhibit 3 in this proceeding, which
 11 I will represent to you is the complaint that was
 12 served against the defendants.
 13 Do you recognize that document?
 14 A. Yes, I do.
 15 Q. Did you see it at the time it was
 16 drafted?
 17 A. Yes.
 18 Q. So is it fair to say that you saw it
 19 before it was served?
 20 A. Yes.
 21 Q. And the complaint is dated October 3rd,
 22 2007; is that correct?
 23 A. October 3rd?
 24 Q. If you'll look at the page 11 --
 25 A. Yes.

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1 Horan
 2 Q. -- does that conform with your personal
 3 knowledge that the complaint was prepared and/or
 4 served approximately on October 3rd?
 5 A. Yes.
 6 Q. And is that, and is -- am I correct that
 7 that is well before there was any contact made with
 8 Ms. Siroka or any report received from Ms. Siroka?
 9 A. Yes.
 10 Q. In that case, sir, could you tell me the
 11 basis in paragraph five for the statement that
 12 defendants -- and I'm quoting now -- quote,
 13 "Defendants' infringing activities have also caused
 14 substantial and irreparable harm to Bourne."
 15 A. Would you repeat the question, please.
 16 Q. Could you tell me the basis of the
 17 statement in the complaint in paragraph five where
 18 it is asserted that, quote, "Defendants' infringing
 19 activities have also caused substantial and
 20 irreparable harm to Bourne."
 21 A. We feel that this use without a license,
 22 and with the nature of the lyrics that were used,
 23 will be harmful to Bourne for two reasons; first,
 24 that it would appear that Bourne did not protect
 25 its copyrights, in that it was, a use such as this

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1 Horan
 2 was made without our consent; and secondly, that,
 3 with the nature of the use of a classic like "When
 4 You Wish Upon A Star," we felt that it could harm
 5 the potential market for the use in commercials and
 6 in other films.
 7 Q. But isn't it fair to say, I think as you
 8 previously testified, you didn't have any evidence
 9 that any such harm had occurred?
 10 MR. FAKLER: Objection, vague as to what
 11 you mean by "evidence." You mean admissible
 12 evidence?
 13 MR. ZAVIN: No. In the common layman's
 14 terms.
 15 Q. Did you have any evidence in October
 16 2007 that there has been any actual harm to the
 17 composition?
 18 A. The evidence we have is that we have,
 19 I've got 25 years' experience in the business, the
 20 owner of the company's been in business for a long
 21 time, and if a song is used, although we cannot
 22 give you dollars-and-cents figures, how a song is
 23 used in one instance can and has affected how the
 24 song is used in future instances, and we feel that
 25 this is a case, exactly this kind of a case now.

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1 Horan
 2 this on the grounds that it's outside the
 3 scope of the 30(b)(6) notice.
 4 MR. ZAVIN: Well, it isn't.
 5 MR. FAKLER: How is it within, how is
 6 the public association of Walt Disney on this
 7 notice? Can you show it to me.
 8 DI Q. Mr. Horan, did you ever watch in the
 9 1950s the television program "The Wonderful World
 10 Of Disney?"
 11 MR. FAKLER: I'm going to instruct the
 12 witness not to answer. This is way outside of
 13 anything on this list.
 14 Q. Mr. Horan, are you following the
 15 instruction of your counsel?
 16 A. Yes, I am.
 17 MR. ZAVIN: I have no further questions.
 18 MR. FAKLER: Can we take 10.
 19 MR. ZAVIN: Sure.
 20 MR. FAKLER: Thanks.
 21 (Recess taken.)
 22 MR. FAKLER: First I'd just on the
 23 record like to request that Mr. Horan have the
 24 opportunity to review and correct any final
 25 transcript of the deposition.

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1 Horan
 2 MR. ZAVIN: Agreed.
 3 MR. FAKLER: And so -- thanks, and I
 4 have just a little bit of cross here, so to
 5 speak.
 6 EXAMINATION BY MR. FAKLER:
 7 Q. Mr. Horan, having answered a series of
 8 questions, is there anything in your testimony that
 9 you feel the need, looking back on it, to amplify
 10 or clarify?
 11 A. Yeah, there were a couple of questions
 12 regarding market substitution and harm to the
 13 market. In a couple of instances I gave an answer
 14 of, if asked if there was any harm I said -- and I
 15 guess just an answer -- no, but in those instances
 16 I should, should have said that, brought up the
 17 loss of revenue from the "Family Guy" use that does
 18 affect Bourne Company.
 19 And then there was also a question about
 20 the, whether or not I was aware of whether or not
 21 the, a request from Fox had come in for the use,
 22 and I said I was not aware whether or not it came
 23 in or what was, whether it was denied or how it was
 24 denied.
 25 That should be clarified to state that

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1 Horan
 2 in 1998, until 2005 in fact, the only person who
 3 would have denied or handled a telephone call
 4 requesting a use would have been Beebe Bourne, who
 5 has since passed away, B-E-E-B-E Bourne, who died
 6 in 2005.
 7 MR. FAKLER: That's all I have.
 8 MR. ZAVIN: Okay, just very simple.
 9 EXAMINATION BY MR. ZAVIN:
 10 Q. I just -- I understand that Beebe Bourne
 11 died, but your answer remains correct that Bourne
 12 as a company does not have any record of the
 13 request, a request coming in or what the nature of
 14 the request was or why it was denied if it was
 15 denied; is that correct?
 16 A. That is correct.
 17 Q. Okay. And just with respect to your
 18 first clarification, is it, does the rest of your
 19 answer remain the same, that you, other than the
 20 loss of whatever revenue that they might have
 21 expected to receive by Fox from the use, Bourne has
 22 no evidence of market harm or market substitution?
 23 A. That is correct.
 24 MR. ZAVIN: Okay, I have no further
 25 questions, except I reserve the right to

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1 Horan
 2 reopen this should the court move favorably,
 3 that the witness was improperly instructed not
 4 to answer certain questions or certain lines
 5 of questions.
 6 (Time noted: 11:45 a.m.)

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11 Sworn and subscribed to
 12 before me this ____ day
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 8
 9 JEREMIAH HORAN

10
 11 Sworn and subscribed to
 12 before me this ____ day
 13 of _____ 2008.

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 16 NOTARY PUBLIC
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